

Office of the Presiding Officer  
Military Commission

September 21, 2005

**Memorandum for:** All Counsel in *United States v. Hicks*  
Chief Defense Counsel  
Chief Prosecutor

**Subject:** Resumption of Proceedings in *United States v. Hicks*

**1. Changes to Commission law and other developments.** MCO # 1 and MCI # 8 has been reissued, superseding previous versions of those documents. The Appointing Authority has lifted his stay of 10 December 2004 in this case, and the Office of Military Commissions has advised the Presiding Officer that there are no judicial stays which would prevent the resumption of proceedings. The Appointing Authority has selected new members and issued other instructions concerning the trial of this case. Taken together, these developments will substantially change procedures for future proceedings.

**2. Purpose of this memo.** The purpose of this memorandum is to a) set forth certain time frames for compliance for filings and other requirements, b) to alert you to other forthcoming time frames which will be the subject of separate emails, and c) advise counsel of particular areas of interest which may be addressed in the initial session(s).

**3. The current procedural posture.**

a. Prior proceedings in this case were based upon an MCO and MCIs which have been revised and/or superseded and were held before members who are no longer detailed to the Commission. The net effect of the changes is that none of the below are before or binding upon the current Commission:

- 1) any motion or request for relief previously filed with the Commission,
- 2) any Review Exhibit previously entered into the record, and,
- 3) any ruling by the Commission.

b. While the session transcripts, previous filings inventories, and Review Exhibits exist as part of the case of *United States v. Hicks*, the parties must submit new filings and Review Exhibits if they wish the current Commission to consider them. The practical effect is that any Review Exhibit or filing counsel wish considered must be filed again. This includes the charge sheet, qualifications of counsel, all motions and requests for relief, and anything else which was presented by counsel to the Commission.

c. If counsel wish that a previous filing be considered, they may NOT refer to the previous filing or exhibit. They must re-file. The exception would be if counsel wished for the Presiding Officer to consider a previously made oral argument concerning a

motion or other request for relief. In that case, counsel may mark the applicable pages of the transcript prepared and maintained by the CCMC and submit it as an exhibit.

d. The review exhibit log and the filings inventory will be restarted with number 101 to avoid any confusion concerning what is before the current Commission.

e. To assist the efficiency of the proceedings, the Assistant will arrange for all the voir dire of the Presiding Officer from the prior sessions in all prior cases to be marked as a Review Exhibit, as well as all matters provided by the Presiding Officer in the prior proceedings concerning his voir dire.

**4. POMs.** All the POMs remain in effect though we are working now to conform them to the changes in Commission Law. Significant revisions will be provided to counsel for comment and their use as soon as possible. The current POMs are at:  
[http://www.defenselink.mil/news/Aug2004/commissions\\_memoranda.html](http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html)

**5. Communications.** The required notices and other communications outlined below will be made to the APO by email. See POM # 3-2. Copies of communications to the APO will be provided to opposing parties, and to the PO. In this regard, the requirement to communicate and file via email is still the rule when the parties are at Guantanamo, and counsel and their legal NCOs must be up on email as soon as they arrive at Guantanamo. Counsel who have problems with getting on the Guantanamo system must coordinate immediately with the CCMC for assistance in resolving those problems.

**6. Identification of counsel.** **NLT 11 OCT 05**, the Chief Prosecutor and Chief Defense counsel will provide the APO the appropriate documents showing what counsel are detailed to the case, and which are lead counsel. It is recommended that a new detailing memo be prepared that supersedes previous memos. For civilian counsel and foreign attorneys, the Chief Defense Counsel will forward to the APO those items required by the MCIs to show that counsel are authorized to appear before the commission.

## **7. Docketing.**

a. **NLT 26 SEP 05**, each counsel will provide the APO with calendars for the period 1 OCT 05 thru 31 January 06. These calendars will list all periods in which counsel believe that they will be unavailable for Commission proceedings in Guantanamo due to previously made commitments. Periods of unavailability will state the reason for the unavailability.

b. **NLT 29 SEP 05**, the lead counsel for each side will provide a proposed trial schedule showing when motions should be heard, voir dire conducted, and trial on the merits should begin. Counsel are encouraged to discuss the proposed schedule with each other prior to making the submission. The APO is always available for a conference call on trial schedules.

## **8. Motions.**

a. Motions and other requests for relief (except where there is a different time frame established elsewhere in this memo) by either side must be submitted **NLT 3 OCT 05**. Motions made by this time do not require notice of motions. POM 4-3 applies. Counsel are NOT required to attach documents referenced in their filings if the document is in the Commissions Library. Counsel are still required to identify any attachments, but if the attachment is in the Commission Library, the filing must so state. See POM # 14-1.

b. **NLT 11 OCT 05**. Responses to motions due.

c. **NLT 17 OCT 05**. Replies due.

**9. Protective Orders.** All Protective Orders issued by the Presiding Officer remain in effect **until 3 OCT 05**. If parties wish to have the Presiding Officer issue a protective order or extend an existing one (with or without modifications), see POM #9-1.

**10. Discovery.** By separate email today, you will be sent a Discovery Order issued by the Presiding Officer.

a. If counsel need clarification on the wording or wish to suggest minor fine tuning - neither which challenge the Presiding Officer's authority to issue a discovery order - send the Assistant an email **NLT 26 SEP 05** with your thoughts in the body, and CC opposing counsel. The Assistant will work clarifications with the Presiding Officer.

b. Counsel who object to the Presiding Officer's authority to issue a discovery order, or request modification other than clarification or fine-tuning, shall file a motion in accordance with POM# 4-3 **NLT 29 SEP 05**.

c. Counsel may also refer to POM 7-1 in the event they believe opposing counsel have not complied with a discovery order provision.

**11. Access to evidence.** Requests for access to evidence (POM # 7-1) will be filed **NLT 11 OCT 05**. Before making such a request, you might first examine the Discovery Order to see if compliance will meet your needs.

**12. Voir dire.** On 8 September 2005, Chief Legal NCOs were directed to forward to counsel a copy of an email from the Assistant which contained the proposed questionnaire for prospective members. The suspense for comments or objections established in that email was 15 September 2005.

## **13. Witnesses.**

a. Witness requests for witnesses needed for motions will be submitted by **NLT 7 OCT 05**. Such requests must comply with POM # 10-1.

b. Counsel are requested to file witness requests for merits (findings or sentencing) as soon as possible. The Presiding Officer will establish a “not later than date” for these requests at a later time.

**14. Instructions to members.** On 8 September 2005, Chief Legal NCOs were directed to forward an email to all counsel from the Assistant with an attachment entitled “First Instructions to Members.” The suspense for comments or objections on the instructions established in that email was 15 Sep 05. These instructions have been emailed to each prospective member.

**15. Invitation for views of the parties.** In the next few days, counsel will receive emails (the subject block will indicate a PO Filing Inventory number) which directs counsel to reply to certain questions. The issues you will be asked to address are listed below, in order to give you a heads-up. The time frame for counsel responses will be contained in the separate PO filings emails.

- a. Standard for challenges for cause against a member.
- b. The meaning of the terms evidence and admissibility of evidence under the provisions of paragraphs 4A(5)(a) and 4A(5)(f), MCO # 1, 31 August 2005.
- c. Military Commission as competent tribunal under the provisions of Art 5, GPW.
- d. Reference MCO # 1, 31 August 2005, vis a vis the President's Military Order of 13 November 2001.
- e. Notice and reason for a party's intent to request a closed session.

**16. Questions or clarifications of this memo** should be addressed immediately to the Assistant with a CC to the Presiding Officer.

**17. Attention to detail required.**

a. The POMs are consistent that email is the method by which counsel communicate with the APO/PO and submit filings (See POM 3-1.). All filings and all attachments must be in electronic form. Web URLs are no longer acceptable to present matters to the APO/PO because the web changes daily. If there is something on a web page you wish considered, save it electronically and submit it as an attachment to a filing - or even better, have the attachment placed into the Commissions Library.

b. If you do not pay attention to the format and procedures in the POMs, you are going to waste resources.

c. Remember that all emails must be on a single topic (like a filing for a single motion), and the subject line must be descriptive of the topic. In the case of an item in the filings inventory, cite the filing number.

d. Be attentive to POM #10-1 concerning witness requests.

1. Often the problem with a witness request is the synopsis. As paragraph 4c of POM #10 states: "Unnecessary litigation often occurs because the synopsis is insufficiently detailed or is cryptic. A well- written synopsis is prepared as though the witness were speaking (first person), and demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered." If your synopsis just provides the topic or the subject on which the witness will testify, it probably does not meet the criteria of POM #10-1.

2. Requests which do not meet the criteria of POM #10-1 will not be accepted as a filing. However, the APO is always available, either by telephone or electronically, to work with counsel to insure that the synopsis is prepared properly.

**18. Extensions.** The Presiding Officer was informed on 20 September 2005 that the detailed defense counsel, MAJ Mori, is presently on a scheduled, "use or lose" leave and will be outside the United States until 30 September 2005. The lead defense counsel and the Chief Defense Counsel are reminded that paragraph 13b, POM# 4-3 (20 Sep 05) permits a request for extension of time to be filed by any counsel on the case or by the Chief or Deputy Chief Defense Counsel.

**BY DIRECTION OF THE PRESIDING OFFICER**

/s/

KEITH H. HODGES

Assistant to the Presiding Officers

1 Enclosure

Summary of time frames

**Enclosure - Summary of deadlines in this memo.**

Due Date	Ref Para in this memo	What	By whom	How
26 SEP 05	10a	Wording suggestions to Discovery Order. ( <i>Discovery Order to be sent by separate email</i> )	Parties	Body of an email
26 SEP 05	7a	Calendars for 1 OCT 05 through 31 JAN 06 showing unavailability and reasons therefore	Each counsel	Email attachment
29 SEP 05	7b	Proposed trial schedule.	Lead counsel	Email attachment
29 SEP 05	10b	Objections to Presiding Officer issuing Discovery Order ( <i>Discovery Order to be sent by separate email</i> )	Parties	POM 4-3
3 OCT 05	8a	Motions	Parties	POM 4-3
3 OCT 05	9	Request to extend Protective Orders (with or without modification) <b>Note:</b> Existing Protective Orders issued by the Presiding Officer will expire on 3 OCT 05.	Parties	POM 9-1
7 OCT 05	13a	Request for witnesses on motions.	Parties	POM 10-1
11 OCT 05	8b	Responses.	Parties	POM 4-3
11 OCT 05	11	Requests for access to evidence	Parties	POM 7-1
11 OCT 05	6	Document on qualifications and detailing of counsel, and who is lead counsel	Chief Pros & Chief Defense	Email attachment of the document
11 OCT 05	6	Qualifications of civilian counsel and foreign counsel	Chief Defense	Email attachment of the document
17 OCT 05	8c	Replies.	Parties	POM 4-3
To be announced	15	Invitation for views of the parties (negative replies required.)  Instructions will be contained in the separate emails to be sent in the next several days.	Parties	Per instructions in the email.